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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 **FEDERAL TRADE COMMISSION,**

14 Plaintiff,

15 v.

16 NEXTCLICK MEDIA, LLC, a Delaware
limited liability company, dba Stop
17 Smoking180.com,
Stopsmokingresolution.com,
18 Beautifulskin.com, and
OnLineDirectProducts;

19 NEXT INTERNET, LLC, a Delaware
limited liability company,

21 KENNETH CHAN, individually and as an
officer of NEXTCLICK MEDIA, LLC, and
22 NEXT INTERNET, LLC, and

23 ALBERT CHEN, individually and as an
officer of NEXT CLICK MEDIA, LLC,
24

25 Defendants.
26

4:08-cv-01718 VRW

[Proposed]

PRELIMINARY INJUNCTION

27 This matter comes before the Court on Plaintiff Federal Trade Commission's
28 Complaint for an injunction and other equitable relief and its application pursuant to Fed.

Preliminary Injunction

1 R. Civ. P. 65(b) for a temporary restraining order with asset freeze and other equitable
2 relief and an Order to Show Cause Why a Preliminary Injunction Should Not Issue. The
3 Temporary Restraining Order (“TRO”) with asset freeze, other equitable relief, and
4 Order to Show Cause have been granted and served on Defendants, as have the Summons
5 and Complaint. The Court, having considered all pleadings, declarations, exhibits,
6 memoranda of law concerning this matter, and other information from all parties, and
7 now being fully advised in the premises, finds:

8 1. This Court has jurisdiction of the subject matter of this case and
9 jurisdiction over all the parties, and venue in this district is proper;

10 2. There is good cause to believe that Defendants NextClick Media, LLC, dba
11 StopSmoking180.com, StopSmokingResolution.com, BeautifulSkin.com, and
12 OnLineDirectProducts; Next Internet, LLC; Kenneth Chan; and Albert Chen have
13 engaged in and are likely to engage in acts that violate Sections 5(a) and 12 of the
14 Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45(a) and 52, Section 907(a)
15 of Electronic Fund Transfer Act (“EFTA”), 15 U.S.C. § 1693e(a), and Section 205.10(b)
16 of Regulation E, 12 C.F.R. § 205.10(b), and that the Commission is therefore likely to
17 prevail on the merits of this action;

18 3. Specifically, the Court finds that the FTC is likely to prevail in showing
19 that, in the course of advertising their smoking-cessation and skin-care products,
20 Defendants unlawfully, and in violation of Section 5(a) of the FTC Act, 15 U.S.C.
21 § 45(a), have made the following misrepresentations: (a) that there is no cost for a trial of
22 Defendants’ products other than a shipping and handling fee; (b) and that consumers in
23 the continuity program will be able to cancel at any time and cancel easily so as not to
24 incur further monthly charges;

25 4. The Court also finds that the FTC is likely to prevail in showing that, in the
26 course of advertising their smoking-cessation and skin-care products, Defendants
27 represented, expressly or by implication, that consumers will have a specified trial period
28 in which to review Defendants’ programs without incurring any charges other than

1 shipping and handling. The Court further finds that the FTC is likely to prevail in
2 showing that, in the course of doing so, Defendants failed to disclose, or to disclose
3 adequately, the following material terms of and conditions of Defendants' offer: (a) that
4 the consumer's account will be charged for a one-month supply of product unless the
5 consumer takes affirmative action during the trial period to avoid the charge; (b) that
6 consumers who cancel during the trial period will have to pay to ship unused product
7 back to Defendants; (c) that consumers who cancel and return unused product during the
8 trial period will be billed a restocking fee; and (d) that consumers who do not cancel and
9 return unused product during the trial period will be charged for future shipments or
10 product. The Court finds that the FTC is likely to prevail in showing that the failure of
11 Defendants to disclose, or to disclose adequately the material information described
12 above is a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C.
13 § 45(a);

14 5. The Court also finds that the FTC is likely to prevail in showing that, in the
15 course of advertising and selling their smoking-cessation and skin-care products,
16 Defendants have caused charges to be submitted for payment to the credit and debit cards
17 of consumers (a) who cancelled or attempted to cancel their enrollment in Defendants'
18 continuity program; or (b) who were not adequately informed of the terms and conditions
19 of Defendants' continuity programs, and, therefore, did not provide express informed
20 consent for the charges. The Court finds that the FTC is likely to prevail in showing that
21 this practice of causing charges to be submitted for payment without obtaining
22 consumers' express informed consent causes or is likely to cause substantial injury to
23 consumers that is not reasonably avoidable by consumers themselves and that is not
24 outweighed by countervailing benefits either to consumers or competition, and, thus, that
25 is an unfair act or practice in violation of Section 5(a) of the FTC Act;

26 6. The Court also finds that the FTC is likely to prevail in showing that
27 Defendants violated Section 907(a) of the EFTA, 15 U.S.C. § 1693e(a), and Section
28 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b). Specifically, the Court finds that the

1 FTC is likely to prevail in showing that Defendants have debited consumers' bank
2 accounts on a recurring basis without obtaining a written authorization signed or
3 similarly authenticated from consumers for preauthorized electronic fund transfers from
4 the accounts;

5 7. Furthermore, the Court finds that the FTC is likely to prevail in showing
6 that Defendants made representations about the superiority and effectiveness of
7 Nicocure, StopSmoking180®, and Zero Nicotine that constitute deceptive practices, and
8 the making of false advertisements, in or affecting commerce, in violation of Sections
9 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. Specifically, the Court finds that
10 the FTC is likely to prevail in showing that Defendants represented, expressly or by
11 implication, that (a) Nicocure, StopSmoking180®, and Zero Nicotine are more effective
12 than nicotine-based products for smoking cessation; (b) Nicocure and StopSmoking180®
13 have a 97 percent effectiveness rate for smoking cessation; and (c) Nicocure and
14 StopSmoking180® enable smokers to quit smoking permanently. Furthermore, the Court
15 finds that the FTC is likely to prevail in showing that Defendants' representations set
16 forth above are false or were not substantiated at the time the representations were made,
17 and thus that the making of such representations violate Sections 5(a) and 12 of the FTC
18 Act;

19 8. There is good cause to believe that immediate and irreparable harm will
20 result from Defendants' ongoing violations of the FTC Act through the present
21 advertising, packaging, labeling, and marketing of the products Nicocure,
22 StopSmoking180®, and ZeroNicotine unless Defendants are restrained and enjoined by
23 order of this Court;

24 9. There is good cause to believe that immediate and irreparable harm will
25 result from Defendants' violations of Sections 5(a) and 12 of the FTC Act, 15 U.S.C.
26 §§ 45(a) and 52, Section 907(a) of EFTA, 15 U.S.C. § 1693e(a), and Section 205.10(b)
27 of Regulation E, 12 C.F.R. § 205.10(b), and that immediate and irreparable damage to
28 the Court's ability to grant effective final relief for consumers in the form of monetary

1 redress will occur from the sale, transfer, or other disposition or concealment by
 2 Defendants of their assets unless Defendants are immediately restrained and enjoined by
 3 this Order; there is thus good cause for an asset freeze and continuation of the
 4 receivership over business Defendants NextClick Media, LLC, and Next Internet, LLC;

5 10. Weighing the equities and considering the Commission's likelihood of
 6 ultimate success, a Preliminary Injunction with asset freeze and other equitable relief is
 7 in the public interest; and

8 11. No security is required of any agency of the United States for issuance of a
 9 preliminary injunction. Fed. R. Civ. P. 65(c).

10 **ORDER**

11 **DEFINITIONS**

12 For the purposes of this Order, the following definitions shall apply:

13 1. "Assets" means any legal or equitable interest in, right to, or claim to any
 14 real or personal property including, but not limited to, chattels, goods, instruments,
 15 equipment, fixtures, general intangibles, effects, leaseholds, mail or other deliveries,
 16 inventory, checks, notes, accounts, credits, receivables (as those terms are defined in the
 17 Uniform Commercial Code), contracts, shares of stock, and all cash, wherever located;

18 2. "Billing Information" means any data that enables any person to access a
 19 customer's account, such as a credit card, checking, savings, share or similar account,
 20 utility bill, mortgage loan account, or debit card;

21 3. "Charge" means any amount charged or debited to a consumer's credit
 22 card, checking, savings, share or similar account, utility bill, telephone bill, mortgage
 23 loan account, or debit card, or any similar form of collecting money from a consumer;

24 4. "Clearly and conspicuously" means that:

- 25 a. with regard to print advertisements, solicitations, or other promotional
- 26 material, the disclosure shall be in a type size and location sufficiently
- 27 noticeable for an ordinary consumer to read and comprehend it, in print that
- 28 contrasts with the background against which it appears; in multi-page

1 promotional materials, the disclosure shall appear on the cover or first
2 page; and

3 b. with regard to Internet advertisements, solicitations, or other
4 promotional material, the disclosure shall be on the same electronic page
5 and next to any advertised price (including free), without the use of pop-up
6 windows or hyperlinks to other electronic pages to display material
7 information and not at the end of a web page that requires consumers to
8 scroll past unrelated information;

9 5. "Competent and reliable scientific evidence" shall mean tests, analyses,
10 research, studies, or other evidence based on the expertise of professionals in the relevant
11 area, that has been conducted and evaluated in an objective manner by persons qualified
12 to do so, using procedures generally accepted in the profession to yield accurate and
13 reliable results;

14 6. "Continuity Program" means any plan, arrangement, or system under
15 which a consumer receives periodic shipments of products or the provision of services
16 without prior notification by the seller before each shipment or service period, regardless
17 of any trial or approval period allowing the consumer to return or be reimbursed for the
18 product or service;

19 7. "Defendant" means NextClick Media, LLC; Next Internet, LLC; Kenneth
20 Chan; or Albert Chen, or any entity or name through which they do business including,
21 but not limited to, StopSmoking180.com, StopSmoking Resolution.com,
22 BeautifulSkin.com, and OnLineDirectProducts;

23 8. "Document" is synonymous in meaning and equal in scope to the usage of
24 the term in Fed. R. Civ. P. 34(a), and includes writings, drawings, graphs, charts,
25 photographs, audio and video recordings, computer records, and other data compilations
26 from which information can be obtained and translated, if necessary, into reasonably
27 usable form through detection devices. A draft or nonidentical copy is a separate
28 document within the meaning of the term;

9. “Financial institution” shall mean any bank, savings and loan institution, credit union, financial institution, brokerage house, escrow agent, money market or mutual fund, telephone or other common carrier, storage company, trustee or any other person, partnership, corporation, or other legal entity maintaining or having control of any records, accounts or other assets, owned directly or indirectly, of record or beneficially, by any Defendant, including accounts or other assets which any Defendant may control by virtue of being a signatory on said accounts;

10. “Material” means likely to affect a person’s choice of, or conduct regarding, goods or services;

11. “Preauthorized Electronic Fund Transfer,” as defined by the Electronic Fund Transfer Act, 15 U.S.C. § 1693a(9), means an electronic fund transfer authorized in advance to recur at substantially regular intervals;

12. “Receivership Defendants” means NextClick Media, LLC, dba StopSmoking180.com, StopSmokingResolution.com, BeautifulSkin.com, and OnLineDirectProducts; and Next Internet, LLC; and

13. The terms “and” and “or” in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable sentence or phrase inclusive rather than exclusive.

CONDUCT PROHIBITIONS (Sections I through III)

I.

Business Activities Related to Continuity Programs

IT IS HEREBY ORDERED that, in connection with the advertising, promoting, offering for sale, or sale of any product or service, Defendants, and their officers, agents, directors, servants, employees, salespersons, independent contractors, attorneys, corporations, subsidiaries, affiliates, successors, and assigns, and all other persons or entities in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, are hereby temporarily

1 restrained and enjoined from:

2 A. Causing Billing Information to be submitted for payment, directly or
3 indirectly, for any product or service advertised, promoted, offered for sale, or sold as
4 part of an offer or agreement involving a Continuity Program, without obtaining the
5 express informed consent of consumers to be charged for any such product or service
6 using an account identified with sufficient specificity for consumers to understand what
7 account will be charged. To evidence consumers' express informed consent, Defendants
8 must disclose clearly and conspicuously, before consumers provide any billing
9 information or pay any fee, all material terms and conditions of the offer or agreement,
10 and obtain consumers' affirmative agreement. Material terms and conditions of an offer
11 or agreement involving a Continuity Program include, but are not limited to:

- 12 1. the fact that the customer's account will be charged unless the
13 customer takes an affirmative action to avoid the Charge(s);
- 14 2. the date(s) the Charge(s) will be submitted for payment;
- 15 3. the specific steps the customer must take to avoid the Charge(s);
- 16 4. all material terms and conditions of a guarantee, refund, or return
17 policy, or if Defendants have a policy of not making refunds or
18 accepting returns, a statement that this is Defendants' policy;
- 19 5. the fact, if true, that periodic shipments of products or the periodic
20 provisions or the continuation of services will occur without further
21 action by consumers;
- 22 6. a description of each good or the type of good to be included in each
23 shipment or a description of the services that will be performed or
24 continued;
- 25 7. if the products are shipped or services provided on a periodic basis,
26 the approximate interval between each shipment or service period or
27 the number of shipments or service periods per year;
- 28 8. the cost or range of costs for each shipment or service period,

1 including shipping and handling fees and restocking fees;

2 9. the minimum number of purchases or minimum service period
3 required by Defendants, if any; and

4 10. any limitations or restrictions concerning free trials that Defendants
5 offer to consumers in connection with a Continuity Program
6 including, but not limited to, the dates that a free trial period begins
7 and ends;

8 B. Misrepresenting, in any manner, expressly or by implication:

9 1. any fact material to a consumer's decision to purchase any product
10 or service sold or offered for sale by any Defendant; and

11 2. any material terms and conditions of an offer or agreement
12 involving a Continuity Program including, but not limited to:

13 a. the fact that the consumers' account(s) will be charged unless
14 they take affirmative action to avoid the Charge(s);

15 b. the date(s) the Charge(s) will be submitted for payment;

16 c. the specific steps consumers must take to avoid the Charge(s)
17 or to cancel the Continuity Program;

18 d. that any product or service offered as part of an offer or
19 agreement involving a Continuity Program is not offered as
20 part of such an offer or agreement, or may be purchased
21 without entering into such an agreement;

22 e. that consumers can "cancel anytime" or the period of time
23 within which consumers can cancel;

24 f. that consumers have agreed to receive additional products or
25 services;

26 g. that consumers are obligated to pay for subsequently shipped
27 products or services provided;

28 h. that Defendants will honor consumers' requests to cancel

their participation in Defendants' programs;

i. that consumers will be able to cancel their participation in Defendants' programs easily; and

j. that Defendants will use consumers' credit or debit card account numbers only to charge for shipping and handling;

C. Failing to honor a request that Defendants receive to cancel any sale or transaction involving enrollment in a Continuity Program, and to provide a refund in accordance with Defendants' disclosed guarantee, refund, or return policy; and

D. If Defendants require any mechanism in order for a consumer to obtain a refund, including, but not limited to, a return authorization number, failing to employ technology and personnel sufficient to enable a consumer to obtain such mechanism within one business day of the consumer's first attempt to obtain such mechanism.

II.

Business Activities Prohibited Pursuant to the Electronic Fund Transfer Act

IT IS FURTHER ORDERED that Defendants, and their officers, agents, directors, servants, employees, salespersons, independent contractors, attorneys, corporations, subsidiaries, affiliates, successors, and assigns, and all other persons or entities in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, are hereby temporarily restrained and enjoined from:

A. In connection with any consumer who is enrolled into any Continuity Program subsequent to the date of this Order and who uses a debit card or other means of electronic funds transfer,

1. failing to obtain written authorization for preauthorized Electronic Fund Transfers from a consumer's account before initiating any Preauthorized Electronic Fund Transfer, as required by Section 907(a) of EFTA, 15 U.S.C. § 1693e(a) and Section 205.10(b) of

1 Regulation E, 12 C.F.R. § 205.10(b), as more fully set out in Section
 2 205.10 of the Federal Reserve Board's Official Staff Commentary to
 3 Regulation E, 12 C.F.R. § 205, Supp. I; and

- 4 2. failing to maintain procedures reasonably adapted to avoid an
 5 unintentional failure to obtain written authorization for a
 6 Preauthorized Electronic Fund Transfer, as required in Section
 7 205.10 of the Federal Reserve Board's Official Staff Commentary to
 8 Regulation E, 12 C.F.R. § 205, Supp. I; and

9 B. In connection with any consumer who was enrolled into any Continuity
 10 Program prior to the date of this Order and who indicated the use of a credit card when in
 11 fact a debit card was used, if entities covered by this provision later find that the card
 12 used is a debit card, failing to obtain written authorization for preauthorized Electronic
 13 Fund transfers from the consumer's account as soon as reasonably possible, or ceasing to
 14 debit the consumer's account, as required by Section 907(a) of EFTA, 15 U.S.C.
 15 § 1693e(a) and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b), as more fully
 16 set out in Section 205.10 of the Federal Reserve Board's Official Staff Commentary to
 17 Regulation E, 12 C.F.R. § 205, Supp. I.

18 III.

19 Prohibited Representations About Smoking-Cessation Products

20 **IT IS FURTHER ORDERED** that, in connection with the manufacturing,
 21 labeling, advertising, promotion, offering for sale, sale, or distribution of any smoking-
 22 cessation product, Defendants, and their officers, agents, directors, servants, employees,
 23 salespersons, independent contractors, attorneys, corporations, subsidiaries, affiliates,
 24 successors, and assigns, and all other persons or entities in active concert or participation
 25 with them, who receive actual notice of this Order by personal service or otherwise,
 26 whether acting directly or through any trust, corporation, subsidiary, division, or other
 27 device, or any of them, are hereby temporarily restrained and enjoined from making any
 28 representation, in any manner, expressly or by implication, about the absolute or

1 comparative benefits, performance, efficacy, safety, or side effects of such product,
 2 including, but not limited to, any representation that such product:

3 A. Is more effective than nicotine patches, nicotine gum, and prescription
 4 medications for smoking cessation; and

5 B. Has a certain level of effectiveness;
 6 unless the representation, including any such representation made through the use of
 7 endorsements or trade names, is true, non-misleading, and, at the time it is made,
 8 Defendants possess and rely upon competent and reliable scientific evidence that
 9 substantiates such representation.

10 IV.

11 ASSET FREEZE

12 **IT IS FURTHER ORDERED** that Defendants and their officers, directors,
 13 agents, servants, employees, salespersons, distributors, corporations, subsidiaries,
 14 affiliates, successors, assigns, and those persons or entities in active concert or
 15 participation with them who receive actual notice of this Order by personal service,
 16 facsimile, or otherwise, are hereby temporarily restrained and enjoined from:

17 A. Selling, liquidating, assigning, transferring, converting, loaning,
 18 encumbering, pledging, concealing, dissipating, spending, withdrawing, or otherwise
 19 disposing of any funds, real or personal property, or other assets or any interest therein,
 20 wherever located, including any assets outside the territorial United States, that are:

- 21 1. in the actual or constructive possession of any Defendant; or
- 22 2. owned or controlled by, or held, in whole or in part for the benefit
- 23 of, or subject to access by, or belonging to, any Defendant; or
- 24 3. in the actual or constructive possession of, or owned or controlled
- 25 by, or subject to access by, or belong to, any corporation,
- 26 partnership, trust, or other entity directly or indirectly under the
- 27 control of any Defendant;

28 B. Opening or causing to be opened any safe deposit boxes titled in the name

1 of any Defendant, or subject to access by any Defendant;

2 C. Incurring charges or cash advances on any credit or debit card issued in the
3 name, singly or jointly, of any Defendant, or any corporation, partnership, or other entity
4 directly or indirectly owned, managed, or controlled by any Defendant; and

5 D. Failing to disclose to the Commission, immediately upon service of this
6 Order, information that fully identifies each asset of any Defendant, and each entity
7 holding such asset, including, but not limited to, the entity's name, address, and
8 telephone number, the number of the account, and the name under which the account is
9 held.

10 **Provided, however,** that the Asset Freeze provisions of this Section IV of the
11 Order shall not apply to employment income earned by Defendants Kenneth Chan and
12 Albert Chen after the date this Order is entered, where said employment is not in
13 violation of Sections I-III of this Order.

14 V.

15 **RETENTION OF ASSETS BY THIRD PARTIES**

16 **IT IS FURTHER ORDERED** that, pending further order of this Court, any
17 bank, savings and loan, financial or brokerage institution, fund, escrow agent, trustee,
18 mail receipt facility, or other person or entity served with a copy of this Order, or who
19 otherwise has actual knowledge of this Order, that has possession, custody, or control of
20 any account, asset, safe deposit box, or document held on behalf of, or relating or
21 belonging to NextClick Media, LLC; Next Internet, LLC; Kenneth Chan; or Albert Chen
22 shall:

23 A. Hold and retain within such entity's or person's control, and prohibit the
24 withdrawal, removal, assignment, transfer, pledge, hypothecation, encumbrance,
25 disbursement, dissipation, conversion, sale, liquidation, or other disposal of any funds,
26 documents, property, or other assets held by or under such entity's or person's control:

- 27 1. on behalf of, or for the benefit of, any Defendant;
- 28 2. in any account maintained in the name of, or subject to withdrawal

1 by, any Defendant; or

2 3. that are subject to access or use by, or under the signatory power of,
3 any Defendant;

4 B. Deny access to any safe deposit box that is:

5 1. titled in the name, individually or jointly, of any Defendant; or

6 2. subject to access by any Defendant;

7 3. **Provided, however,** that the Receiver may have access to any safe
8 deposit box titled in the name of NextClick Media, LLC, or Next
9 Internet, LLC, or subject to access by agents of NextClick Media,
10 LLC, or Next Internet, LLC;

11 C. Provide to counsel for the Commission and to the Receiver, within three (3)
12 days, a statement setting forth:

13 1. the identification of each account or asset titled in the name,
14 individually or jointly, or held on behalf of, or for the benefit of, any
15 Defendant, whether in whole or in part;

16 2. the balance of each such account, or a description of the nature and
17 value of such asset;

18 3. the identification of any safe deposit box that is either titled in the
19 name of, individually or jointly, or is otherwise subject to access or
20 control by, any Defendant, whether in whole or in part; and

21 4. for any account, safe deposit box, or other asset that has been closed
22 or removed within one year from the date of entry of this Order, the
23 date closed or removed and the balance on said date; and

24 D. Upon request by the Commission or by the Receiver, promptly provide the
25 Commission or the Receiver with copies of all records or other documentation pertaining
26 to such account, asset, or safe deposit box, including, but not limited to, originals or
27 copies of account applications, account statements, signature cards, checks, drafts,
28 deposit tickets, transfers to and from the accounts, all other debit and credit instruments

1 or slips, currency transaction reports, 1099 forms, and safe deposit box logs.

2 The accounts subject to this Paragraph include existing assets and assets deposited
3 after the effective date of this Order. This Paragraph shall not prohibit transfers or
4 withdrawals in accordance with any provision of this Order, authorized in writing by
5 counsel for the Commission, by the Receiver, or by further order of the Court.

6 **VI.**

7 **PRESERVATION OF RECORDS AND OTHER EVIDENCE**

8 **IT IS FURTHER ORDERED** that Defendants, and their officers, directors,
9 agents, servants, employees, salespersons, distributors, corporations, subsidiaries,
10 affiliates, successors, assigns, and those persons or entities in active concert or
11 participation with them who receive actual notice of this Order by personal service,
12 facsimile, or otherwise, are hereby enjoined from:

13 A. Destroying, erasing, mutilating, concealing, altering, transferring or
14 otherwise disposing of, in any manner, directly or indirectly, any smoking cessation
15 product or any product involving a Continuity Program advertised, marketed, promoted,
16 offered for sale, distributed, or sold by any Defendant;

17 B. Destroying, erasing, mutilating, concealing, altering, transferring or
18 otherwise disposing of, in any manner, directly or indirectly, contracts, agreements,
19 customer files, customer lists, customer addresses and telephone numbers,
20 correspondence, advertisements, brochures, sales material, training material, sales
21 presentations, documents evidencing or referring to products or services sold by
22 Defendants, data, computer tapes, disks, or other computerized records, books, written or
23 printed records, handwritten notes, telephone logs, "verification" or "compliance" tapes
24 or other audio or video tape recordings, receipt books, invoices, postal receipts, ledgers,
25 personal and business canceled checks and check registers, bank statements, appointment
26 books, copies of federal, state or local business or personal income or property tax
27 returns, and other documents or records of any kind, including electronically-stored
28 materials, that relate to the business practices or business or personal finances of any

1 Defendant or other entity directly or indirectly under the control of any Defendant; and

2 C. Failing to create and maintain books, records, and accounts which, in
3 reasonable detail, accurately, fairly, and completely reflect the incomes, assets,
4 disbursements, transactions, and use of monies by any Defendant or other entity directly
5 or indirectly under the control of any Defendant.

6 VII.

7 ACCOUNTING PROVISIONS

8 **IT IS FURTHER ORDERED** that, within five (5) business days after service of
9 this Order,

10 A. Except to the extent that such accounting has been fully completed and
11 delivered previously pursuant to the TRO, for any smoking-cessation product or service,
12 or for any product or service involving a Continuity Program, which Defendants, their
13 officers, directors, agents, servants, employees, salespersons, distributors, corporations,
14 subsidiaries, affiliates, successors, or assigns have advertised, marketed, promoted,
15 offered for sale, or sold, Defendants shall serve on counsel for the Commission a detailed
16 accounting, broken down by product or service, of:

- 17 1. all gross revenues obtained from sales connected with any such
18 promotions, products, or services from inception of sales through the
19 date of entry of the TRO;
- 20 2. all net profits obtained from sales connected with any such
21 promotions, products, or services from inception of sales through the
22 date of entry of the TRO; and
- 23 3. the total number of sales connected with any such promotions,
24 products, or services;

25 B. Unless already provided pursuant to the TRO, Defendants shall prepare and
26 provide to the Commission complete and accurate individual and corporate financial
27 statements, in the form provided by the Commission, signed under penalty of perjury, and
28 copies of personal and corporate income tax returns (local, state, and federal) for the last

1 three (3) years;

2 C. Unless already provided pursuant to the TRO, Defendants shall further
3 provide the Commission with a complete and accurate corporate financial statement in
4 the form provided by the Commission, signed under penalty of perjury, for any
5 corporation owned or controlled by any Defendant and not named in the caption;

6 D. Unless already provided pursuant to the TRO, the Receivership Defendants
7 shall provide profit-and-loss statements from the date of incorporation or formation
8 through the date of this Order;

9 E. Unless already provided pursuant to the TRO, Defendants shall further
10 provide the Commission with statements, verified under oath, of all transfers and
11 assignments of assets and property worth five thousand dollars (\$5,000) or more by any
12 Defendant since January 1, 2006, that shall include the amount or value transferred or
13 assigned, the name and address of the transferee or assignee, the date of the transfer or
14 assignment, and the type and amount of consideration paid to any such Defendant; and

15 F. Unless already provided pursuant to the TRO, each Defendant shall
16 provide the Commission with access to records and documents pertaining to assets of
17 such Defendant that are held by financial institutions outside the territory of the United
18 States, by signing a document entitled "Consent to Release of Financial Records," which
19 the Commission has provided.

20 **VIII.**

21 **REPATRIATION OF ASSETS**

22 **IT IS FURTHER ORDERED** that, within five (5) business days after service of
23 this Order, each Defendant shall:

24 A. Repatriate to the United States all funds, documents, or assets in foreign
25 countries held, jointly or singly, either by, for the benefit of, or under the direct or
26 indirect control of such Defendant;

27 B. On the same business day as any repatriation under Subparagraph A above,
28 1. notify the Commission and the Receiver of the name and location of

1 the financial institution or other entity that is the recipient of such
2 funds, documents, or assets; and

3 2. serve this Order on any such financial institution or other entity;

4 C. Provide the Commission and the Receiver with a full accounting of all
5 funds, documents, and assets outside of the territory of the United States held, jointly or
6 singly, either by, for the benefit of, or under the direct or indirect control of such
7 Defendant; and

8 D. Hold and retain all repatriated funds, documents, and assets and prevent
9 any transfer, disposition, or dissipation whatsoever of any such assets or funds.

10 **IX.**

11 **INTERFERENCE WITH REPATRIATION**

12 **IT IS FURTHER ORDERED** that Defendants are hereby temporarily restrained
13 and enjoined from taking any action, directly or indirectly, which may result in the
14 encumbrance or dissipation of foreign assets, or in the hindrance of the repatriation
15 required by Section VIII of this Order, including but not limited to:

16 A. Sending any statement, letter, fax, e-mail or wire transmission, telephoning
17 or engaging in any other act, directly or indirectly, that results in a determination by a
18 foreign trustee or other entity that a “duress” event has occurred under the terms of a
19 foreign trust agreement, until such time that all assets have been fully repatriated
20 pursuant to Section VIII of this Order; and

21 B. Notifying, or causing the notification of, any trustee, protector or other
22 agent of any foreign trust or other related entities of either the existence of this Order, or
23 of the fact that repatriation is required pursuant to a Court Order, until such time that all
24 assets have been fully repatriated pursuant to Section VIII of this Order.

25 **X.**

26 **NOTIFICATION OF BUSINESS ACTIVITIES**

27 **IT IS FURTHER ORDERED** that Defendants Kenneth Chan and Albert Chen
28 are hereby restrained and enjoined from creating, operating, or exercising any control

1 over any business entity, including any partnership, limited partnership, joint venture,
2 sole proprietorship, or corporation, without first providing counsel for the Commission
3 with a written statement disclosing the following: (1) the name of the business entity; (2)
4 the address and telephone number of the business entity; (3) the names of the business
5 entity's officers, directors, principals, managers, and employees; and (4) a detailed
6 description of the business entity's intended activities.

7 **IT IS FURTHER ORDERED** that Defendants Kenneth Chan and Albert Chen
8 shall notify the Commission at least seven (7) days prior to any affiliation with any new
9 or previously inactive business or employment. Each notice shall include the applicable
10 Defendant's new business address and a statement of the nature of the new business or
11 employment and of his duties and responsibilities in connection with that business or
12 employment.

13 **XI.**

14 **NON-DISCLOSURE OF CONSUMER LISTS**

15 **IT IS FURTHER ORDERED** that Defendants are temporarily restrained and
16 enjoined from selling, renting, leasing, transferring, or otherwise disclosing the name,
17 date of birth, address, telephone number, credit card number, bank account number, e-
18 mail address, or other identifying information of any person who submitted such
19 information to Defendants at any time prior to entry of this Order, **provided, however,**
20 that Defendants may disclose such identifying information to a law enforcement agency,
21 or as required by any law, regulation, or court order.

22 **XII.**

23 **APPOINTMENT OF RECEIVER**

24 **IT IS FURTHER ORDERED** that _____ is hereby
25 appointed Receiver, with the full power of an equity receiver, for the Receivership
26 Defendants. The Receiver shall be the agent of this Court and solely the agent of this
27 Court in acting as receiver under this Order. The Receiver shall be accountable directly
28 to this Court. As required by Local Rule 66-5, the Receiver shall file a report with the

1 Court within 30 days of appointment. Thereafter, the Receiver shall file a report every
2 ninety (90) days updating the Court on the status of Receivership Defendants, the
3 fulfillment of the Receiver's duties as set forth in this Order, and any other relevant
4 issues whose inclusion the Receiver deems appropriate. The Receiver shall comply with
5 all Local Rules of this Court governing receivers. The Receiver has the directions and
6 authority to:

7 A. Assume full control of the Receivership Defendants and all power of the
8 Receivership Defendants' directors, officers, and managers, and remove Defendants
9 Kenneth Chan and Albert Chen, and any other officer, independent contractor, employee,
10 attorney, or agent of the Receivership Defendants, from control or management of, or
11 participation in, the affairs of the Receivership Defendants as the Receiver deems
12 necessary and advisable;

13 B. Take immediate and exclusive custody, control, and possession of all
14 properties, premises, assets, and documents of, in the possession of, or under the control
15 of, either Receivership Defendant, wherever situated, including, but not limited, to 667
16 Folsom Street in San Francisco, CA, 94107; 880 Harrison Street in San Francisco, CA,
17 94107; 2525 East Charleston Road, Suite 101, and 2513 East Charleston Road, Suite
18 102, in Mountain View, CA, 94043; and PO Box 390351 in Mountain View, CA, 94039.
19 The Receiver shall have full power to divert mail and to sue for, collect, receive, and take
20 possession of:

- 21 1. all assets and documents of the Receivership Defendants and
22 members of the public whose interests are now held by or are under
23 the direction, possession, custody, or control of either Receivership
24 Defendant; and
- 25 2. all sums of money now or hereafter due and owing to either
26 Receivership Defendant. Provided, however, that the Receiver shall
27 not attempt to collect any amount from a consumer if the Receiver
28 believes the consumer was a victim of the unfair or deceptive acts or

1 practices alleged in the Complaint in this matter;

2 C. Perform all acts necessary to conserve, hold, manage, and preserve the
3 value of all such assets;

4 D. Hold, preserve, and administer the business of the Receivership Defendants
5 until further order of this Court, with full authority to perform all acts necessary or
6 incidental thereto, including retaining, hiring, or dismissing any employees, independent
7 contractors, or agents;

8 E. Take such actions and enter into such agreements in connection with the
9 administration of the Receivership Defendants as the Receiver deems necessary;

10 F. Choose, engage, and employ attorneys, accountants, appraisers, and other
11 independent contractors, and technical specialists, as the Receiver deems advisable or
12 necessary in the performance of duties and responsibilities under the authority granted by
13 this Order;

14 G. Make payments and disbursements from the receivership estate that the
15 Receiver deems necessary to secure or preserve the Receivership Defendants' assets or to
16 carry out the Receiver's mandate under this Order;

17 H. Institute, prosecute and defend, compromise, intervene in, or become party
18 to such actions or proceedings in state, federal, or foreign court that the Receiver deems
19 necessary to collect, recover, protect, maintain, or preserve the value of the assets of the
20 Receivership Defendants or to carry out the Receiver's mandate under this Order;

21 I. Defend, compromise, or otherwise dispose of any actions or proceedings
22 instituted against the Receiver in his role as Receiver or the Receivership Defendants,
23 whether now pending or hereinafter filed, that the Receiver deems necessary to preserve
24 the assets of the Receivership Defendants or to carry out the Receiver's mandate under
25 this order;

26 J. Take all steps the Receiver deems necessary to secure the business
27 premises of the Receivership Defendants, including, but not limited to:

28 1. completing a written inventory of all receivership assets;

2. obtaining pertinent information from all employees and other agents of the Receivership Defendants, such as the name, home address, social security number, job description, method of compensation, accrued and unpaid commission and compensation of each employee or agent;
3. changing the premises' locks and disconnecting any computer modems or other means of access to the computer systems or to documents maintained at that location; or
4. requiring any persons present on the premises to leave the premises, to provide the Receiver with proof of identification, and to demonstrate to the Receiver's satisfaction that such persons are not removing from the premises any of the Receivership Defendants' documents or assets;

K. Obtain, by presentation of this Order, tangible and intangible assets as well as information in the custody or control of any person, firm, or entity sufficient to identify the accounts, employees, properties, or other assets or obligations of the Receivership Defendants;

L. Issue subpoenas to obtain documents pertaining to the receivership, conduct discovery in this action on behalf of the receivership estate, attend any deposition noticed by any party to this action, and ask any question of any deponent which, in the Receiver's opinion, is pertinent to the receivership estate;

M. Allow representatives of the Commission and the Defendants reasonable access to inspect the Receivership Defendants' books, records, accounts, premises, and other property, wherever located;

N. Determine and implement the manner in which the Receivership Defendants will comply with, and prevent violations of, this Order and all other applicable laws, including, but not limited to, revising sales materials and implementing monitoring procedures;

O. Continue and conduct the business of the Receivership Defendants in such manner, to such extent, and for such duration as the Receiver may in good faith deem to be necessary or appropriate to operate the business profitably and lawfully, if at all; provided, however, that the continuation and conduct of the business shall be conditioned upon the Receiver's good faith determination that the businesses can be lawfully operated at a profit using the assets of the receivership estate; and

P. Open one or more bank accounts as designated depositories for funds of the Receivership Defendants. The Receiver shall deposit all funds of the Receivership Defendants in such designated accounts and shall make all payments and disbursements from the receivership estate from such accounts.

XIII.

COMPENSATION FOR RECEIVER

IT IS FURTHER ORDERED that the Receiver and all personnel hired by the Receiver shall be entitled to reasonable compensation for the services they render to the receivership estate and for the cost of actual out-of-pocket expenses incurred by them, from the assets now held by, in the possession or control of, or which may be received by the Receivership Defendants. The Receiver shall file with the Court and serve on the parties periodic requests for payment, outlining the services rendered and the related fees and expenses, with the first such request filed no more than sixty (60) days after the entry of this Order. The Receiver shall not increase the hourly rates used as the bases for such fee applications without prior approval of the Court.

XIV.

RECEIVER'S BOND

IT IS FURTHER ORDERED that the Receiver shall file with the Clerk of this Court a bond in the sum of _____ with sureties to be approved by the Court, conditioned that the Receiver will well and truly perform the duties of the office and abide by and perform all acts the Court directs.

XV.

DELIVERY OF RECEIVERSHIP PROPERTY

IT IS FURTHER ORDERED that Defendants and any other person or entity served with a copy of this Order, shall immediately deliver or transfer possession, custody, and control of the following to the Receiver:

A. All assets of the Receivership Defendants;

B. All documents and records relating to the assets of the Receivership Defendants, including, but not limited to, financial and accounting records, balance sheets, income statements, bank records (including monthly statements, canceled checks, records of wire transfers, and check registers), distributor lists, and title documents;

C. All keys, lock combinations, passwords, or codes required to open, gain access to, or secure any of the Receivership Defendants' assets or documents, including, but not limited to, access to their business premises, computer systems or files, telephone or other communication systems, and bank accounts; and

D. Information identifying the assets, employees, or obligations of the Receivership Defendants.

IT IS FURTHER ORDERED that in the event any person or entity fails to deliver or transfer any asset or otherwise fails to comply with any provision of this Paragraph, the Receiver may file *ex parte* an Affidavit of Non-Compliance regarding the failure. Upon the filing of the affidavit, the Court may authorize, without additional process or demand, Writs of Possession or Sequestration or other equitable writs requested by the Receiver. The writs shall authorize and direct the United States Marshal or any sheriff or deputy sheriff of any county (pursuant to Fed. R. Civ. P. 4(c)(1)), or any other federal or state law enforcement officer, to seize the asset, document, or other thing and to deliver it to the Receiver.

XVI.

COOPERATION WITH THE RECEIVER

IT IS FURTHER ORDERED that all Defendants, and their agents, servants,

1 employees, and attorneys, and all persons or entities directly or indirectly under the
2 control of any of them, and all other persons or entities in active concert or participation
3 with any of them who receive actual notice of this Order by personal service or
4 otherwise, and each such person, shall cooperate fully with and assist the Receiver. Such
5 cooperation and assistance shall include, but not be limited to, providing any information
6 to the Receiver that the Receiver deems necessary to exercise the authority and discharge
7 the responsibilities of the Receiver under this Order; providing any password required to
8 access any computer or electronic files in any medium; or advising all persons who owe
9 money to any of the Receivership Defendants (other than customers) that all debts should
10 be paid directly to the Receiver. All Defendants are hereby restrained and enjoined from
11 directly or indirectly:

12 A. Transacting any of the business of the Receivership Defendants, or
13 transacting business under the names NextClick Media, LLC; Next Internet, LLC; any of
14 their dba entities; or any substantially similar names;

15 B. Destroying, secreting, defacing, transferring, or otherwise altering or
16 disposing of any documents of either of the Receivership Defendants, including, but not
17 limited to, books, records, accounts, or any other papers of any kind or nature;

18 C. Transferring, receiving, altering, selling, encumbering, pledging, assigning,
19 liquidating, or otherwise disposing of any assets owned, controlled, or in the possession
20 or custody of, or in which an interest is held or claimed by, either of the Receivership
21 Defendants, or the Receiver;

22 D. Excusing debts owed to either Receivership Defendant;

23 E. Failing to notify the Receiver of any asset, including accounts, of either
24 Receivership Defendant held in any name other than the name of either Receivership
25 Defendant, or by any person or entity other than the Receivership Defendants, or failing
26 to provide any assistance or information requested by the Receiver in connection with
27 obtaining possession, custody, or control of such assets; or

28 F. Doing any act or refraining from any act whatsoever to interfere with the

Receiver's taking custody, control, possession, or management of the assets or documents subject to this receivership; or to harass or interfere with the Receiver in any way; or to interfere in any manner with the exclusive jurisdiction of this Court over the assets or documents of either Receivership Defendant; or to refuse to cooperate with the Receiver or the Receiver's duly authorized agents in the exercise of their duties or authority under any order of this Court.

XVII.

TRANSFER OF FUNDS TO THE RECEIVER

IT IS FURTHER ORDERED that, upon service of a copy of this Order, all banks, broker-dealers, savings and loan associations, escrow agents, title companies, commodity trading companies, and other financial institutions shall cooperate with all reasonable requests of the Receiver relating to implementation of this Order, including transferring funds at his direction and producing records related to the assets of either of the Receivership Defendants.

XVIII.

STAY OF ACTIONS

IT IS FURTHER ORDERED that, except by leave of this Court and except for any federal, state, or local law enforcement or regulatory authority action against the Receivership Defendants, during the pendency of the receivership, Defendants and all other persons seeking to establish or enforce any claim, right, or interest against or on behalf of either Receivership Defendant, be and hereby are stayed from:

A. Commencing, prosecuting, continuing, or enforcing any suit against either Receivership Defendant, except that such actions may be filed to toll any applicable statute of limitations;

B. Commencing, prosecuting, continuing, or enforcing any suit or proceeding in the name of or on behalf of either Receivership Defendant;

C. Accelerating the due date of either Receivership Defendant's obligation or claimed obligation; enforcing any lien upon, or taking, attempting to take, or retaining

1 possession of either Receivership Defendant's assets; attempting to foreclose, forfeit,
2 alter, or terminate any interests of either Receivership Defendant, whether such acts are
3 part of a judicial proceeding or otherwise;

4 D. Using self-help or executing or issuing any process to impound, take
5 possession of, interfere with, create, or enforce a lien upon any asset owned by or in the
6 possession of either Receivership Defendant, the Receiver, or any agent appointed by the
7 Receiver; and

8 E. Committing any act to interfere with the Receiver's taking control,
9 possession, or management of the Receivership Defendants and their assets and
10 documents, or to interfere with the exclusive jurisdiction of this Court over the property
11 and assets of the Receivership Defendants.

12 **Provided** that this Paragraph does not stay any suit pending in a State court, upon
13 motion and a finding by the Court that the moving party will suffer substantial injury if it
14 is not permitted to proceed.

15 **XIX.**

16 **LIMITED EXPEDITED DISCOVERY**

17 **IT IS FURTHER ORDERED** that the Commission is granted leave at any time
18 after service of this Order to take the deposition of and demand the production of
19 documents from any person or entity for the purpose of discovering the location of a
20 Defendant or the nature, location, status, and extent of assets of any Defendant or their
21 affiliates. Two (2) business days' notice shall be deemed sufficient for any such
22 production of documents or the taking of a deposition from any Defendant, and three (3)
23 business days' notice shall be deemed sufficient for any such production of documents or
24 the taking of a deposition from any other person or entity including, but not limited to,
25 any financial institution. The production of documents submitted pursuant to this
26 provision shall not in any way waive the Commission's rights to seek the production of
27 additional documents. The limitations and conditions set forth in Fed. R. Civ. P.
28 30(a)(2)(B) regarding subsequent depositions of an individual shall not apply to

1 depositions taken pursuant to this Section XIX, nor shall any depositions taken pursuant
2 to this Section XIX count towards the ten-deposition limit set forth in Fed. R. Civ. P.
3 30(a)(2)(A).

4 **XX.**

5 **RIGHT OF ACCESS**

6 **IT IS FURTHER ORDERED** that the Receiver shall subsequently allow the
7 Commission's representatives, and the representatives of the Receivership Defendants
8 and of Defendants Kenneth Chan and Albert Chen, and Defendants Kenneth Chan and
9 Albert Chen themselves reasonable access to the business premises of the Receivership
10 Defendants for the purpose of inspecting and copying any and all books, records,
11 accounts, and other property owned by or in the possession of the Receivership
12 Defendants. The Receiver shall have the discretion to determine the time and manner of
13 this access.

14 **IT IS FURTHER ORDERED** that if, at the time of service of this Order, any
15 records or property relating to any Defendant's business or assets are located in the
16 personal residence of any individual Defendant, and such records or property have not
17 already been produced to the Commission pursuant to the TRO, then such individual
18 Defendant shall, within forty-eight (48) hours of service of this Order, produce to the
19 Commission, at a location designated by the Commission:

20 A. All contracts, accounting data, written or electronic correspondence,
21 advertisements, computer tapes, discs, or other computerized or electronic records,
22 books, written or printed records, handwritten notes, telephone logs, telephone scripts,
23 telephone bills, receipt books, membership records and lists, refund records, receipts,
24 ledgers, bank records (including personal and business monthly statements, canceled
25 checks, records of wire transfers, and check registers), appointment books, copies of
26 federal, state, and local business or personal income or property tax returns, 1099 forms,
27 title records, and other documents or records of any kind that relate to any Defendant's
28 business and assets; and

1 B. All computers and data in whatever form, used by Defendants, in whole or
2 in part, relating to any Defendant's business and assets, along with any passwords or
3 other codes necessary for accessing such computers or data.

4 **XXI.**

5 **CONSUMER REPORTS**

6 **IT IS FURTHER ORDERED** that the Commission may obtain consumer reports
7 concerning any Defendant pursuant to Section 604(a)(1) of the Fair Credit Reporting
8 Act, 15 U.S.C. § 1681b(a)(1), and that, upon written request, any credit reporting agency
9 from which such reports are requested shall provide them to the Commission.

10 **IT IS FURTHER ORDERED** that the Commission may provide to the Receiver
11 copies of any consumer reports it receives pursuant to this provision.

12 **XXII.**

13 **DISTRIBUTION OF ORDER BY DEFENDANTS**

14 **IT IS FURTHER ORDERED** that Defendants shall immediately provide a copy
15 of this Order to each affiliate, subsidiary, division, sales entity, successor, assign, officer,
16 director, employee, independent contractor, distributor, agent, attorney, ad broker,
17 advertising agency, fulfillment house, call center, domain registrar, mail receipt facility,
18 and representative of any Defendant, and, within ten (10) calendar days following service
19 of this Order on Defendants, Defendants shall provide the Commission with an affidavit
20 identifying the names, titles, addresses, and telephone numbers of the persons and entities
21 that Defendants have served with a copy of this Order in compliance with this provision.
22 The Receiver has no obligation under this provision.

23 **XXIII.**

24 **SERVICE OF THIS ORDER**

25 **IT IS FURTHER ORDERED** that copies of this Order may be served by
26 facsimile transmission, email, personal or overnight delivery, or U.S. Mail, upon any
27 financial or brokerage institution, entity, or person that may have possession, custody, or
28 control of any documents or assets of any Defendant, or that may be subject to any

1 provision of this Order.

2 **XXIV.**

3 **CORRESPONDENCE WITH AND NOTICE TO PLAINTIFF**

4 **IT IS FURTHER ORDERED** that, with regard to any correspondence,
5 pleadings, or notifications related to this Order, except as specified above, service on the
6 Commission shall be performed by personal or overnight delivery, by facsimile, by e-
7 mail, or in accordance with the Court's ECF procedures to:

8 THOMAS DAHDOUNH
9 Federal Trade Commission
10 901 Market Street, Suite 570
11 San Francisco, CA 94103
Phone (415) 848-5100/Fax (415) 848-5184
email: tdahdouh@ftc.gov

12 **XXV.**

13 **RETENTION OF JURISDICTION**

14 **IT IS FURTHER ORDERED** that this Court shall retain jurisdiction of this
15 matter for all purposes.

16 **IT IS SO ORDERED:**

17
18
19 DATED: _____ UNITED STATES DISTRICT JUDGE
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